

ST 01-17

Tax Type: Sales Tax

Issue: Responsible Corporate Officer – Failure to File or Pay Tax  
Penalty Under 1002(d) – Failure To File/Pay Withholding

STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
SPRINGFIELD, ILLINOIS

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THE DEPARTMENT OF REVENUE	)	
OF THE STATE OF ILLINOIS	)	
	)	Docket No. 01-ST-0000
v.	)	IBT # 0000-0000
	)	NPL # 0000
JOHN DOE	)	NOD # 0000
	)	
Respondent	)	

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**RECOMMENDATION FOR DISPOSITION**

Appearances: Jim Day, Special Assistant Attorney General, for the Department of Revenue of the State of Illinois; JOHN DOE, appearing *pro se*.

Synopsis:

The Department of Revenue (“Department”) issued a Notice of Penalty Liability (“NPL”) and Notice of Deficiency (“NOD”) to JOHN DOE (“respondent”) pursuant to section 1002(d) of the Income Tax Act (35 ILCS 5/1002(d)) and section 3-7 of the Uniform Penalty and Interest Act (“UPIA”) (35 ILCS 735/3-7). The NPL and NOD allege that the respondent was an officer or employee of ABC, Inc. (“corporation”) who was responsible for wilfully failing to pay the corporation's retailers' occupation taxes (“ROT”) and withholding taxes. The respondent timely protested the NPL and NOD, and

an evidentiary hearing was held. After reviewing the record, it is recommended that the liability be affirmed.

Findings of Fact:

1. The respondent was the president of the corporation. (Dept. Ex. #7; Tr. pp. 12-13)

2. The respondent signed the corporation's ST-1, Sales and Use Tax Return, for the months of February 1998 through April 1999. (Dept. Ex. #3, #5)

3. The respondent signed the corporation's IL-941, Illinois Quarterly Withholding Income Tax Return, for the fourth quarter of 1997, all quarters of 1998, and the first quarter of 1999. (Dept. Ex. #6)

4. The respondent did not present evidence showing that he was not responsible for filing the returns or that he did not willfully fail to pay the corporation's taxes to the Department.

5. On December 18, 2000, the Department issued NPL number 7402 to the respondent that proposed a total penalty liability of \$8,973.88, including tax, interest, and penalty, for failure to pay ROT for the months of April and May of 1999. The NPL was admitted into evidence under the certificate of the Director of the Department. (Dept. Ex. #2).

6. On February 16, 2001, the Department issued NOD number 3771 to the respondent that proposed a total penalty liability of \$1,815.51 for failure to pay the withholding tax liability for the second quarter of 1999. The NOD was admitted into evidence under the certificate of the Director of the Department. (Dept. Ex. #1).

Conclusions of Law:

Section 1002(d) of the Income Tax Act provides as follows:

"Willful failure to collect and pay over tax. Any person required to collect, truthfully account for, and pay over the tax imposed by this Act

who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payment thereof, shall, in addition to other penalties provided by law, be liable for the penalty imposed by Section 3-7 of the Uniform Penalty and Interest Act.” (35 ILCS 5/1002(d)).

Section 3-7 of the Uniform Penalty and Interest Act provides in part as follows:

“Any officer or employee of any taxpayer subject to the provisions of a tax Act administered by the Department who has the control, supervision or responsibility of filing returns and making payment of the amount of any trust tax imposed in accordance with that Act and who wilfully fails to file the return or make the payment to the Department or wilfully attempts in any other manner to evade or defeat the tax shall be personally liable for a penalty equal to the total amount of tax unpaid by the taxpayer including interest and penalties thereon.” (35 ILCS 735/3-7(a))

An officer or employee of a corporation may therefore be personally liable for the corporation's taxes if (1) the individual had the control, supervision or responsibility of filing the returns and paying the taxes, and (2) the individual willfully failed to perform these duties.

For guidance in determining whether a person is responsible under section 3-7, the Illinois Supreme Court has referred to cases interpreting section 6672 of the Internal Revenue Code (26 U.S.C. §6672)<sup>1</sup>. See Branson v. Department of Revenue, 168 Ill.2d 247, 254-56 (1995); Department of Revenue v. Heartland Investments, Inc., 106 Ill.2d 19, 29-30 (1985). These cases state that the critical factor in determining responsibility is whether the person had significant control over the corporation's finances. See Purdy Co. of Illinois v. United States, 814 F.2d 1183, 1186 (7th Cir. 1987) Responsibility is generally found in high corporate officials who have control over the corporation's business affairs and who participate in decisions concerning the payment of creditors and the dispersal of funds. Monday v. United States, 421 F.2d 1210, 1214-1215 (7th Cir. 1970), cert. den. 400 U.S. 821.

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<sup>1</sup> This section imposes personal liability on corporate officers who willfully fail to collect, account for, or pay over employees' social security and Federal income withholding taxes.

In addition, these cases define "wilfull" as involving intentional, knowing and voluntary acts or, alternatively, reckless disregard for obvious known risks. See Branson at 254-56; Heartland at 29-30. Wilfull conduct does not require bad purpose or intent to defraud the government. Branson at 255; Heartland at 30. Willfulness may be established by showing that the responsible person (1) clearly ought to have known that (2) there was a grave risk that the taxes were not being paid and (3) the person was in a position to find out for certain very easily. Wright v. United States, 809 F.2d 425, 427 (7th Cir. 1987). Furthermore, whether the person in question wilfully failed to pay the taxes is an issue of fact to be determined on the basis of the evidence in each particular case. Heartland at 30; Department of Revenue v. Joseph Bublick & Sons, Inc., 68 Ill.2d 568, 577 (1977). Courts have found that giving preferential treatment to other creditors rather than paying the corporation's taxes constitutes wilfull behavior. See Heartland at 29-30.

Under section 3-7, the Department's certified record relating to the penalty liability constitutes *prima facie* proof of the correctness of the amount of tax or penalty due.<sup>2</sup> See Branson at 260. Once the Department presents its *prima facie* case, the burden shifts to the respondent to establish that one or more of the elements of the penalty are lacking, i.e., that the person charged was not the responsible corporate officer or employee, or that the person's actions were not wilfull. Id. at 261. In order to overcome the Department's *prima facie* case, the allegedly responsible person must present more than his or her testimony denying the accuracy of the Department's assessment. A. R. Barnes & Co. v. Department of Revenue, 173 Ill.App.3d 826, 833-34 (1st Dist. 1988).

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<sup>2</sup> The relevant portion of section 3-7 provides as follows: "The Department shall determine a penalty due under this Section according to its best judgment and information, and that determination shall be prima facie correct and shall be prima facie evidence of a penalty due under this Section. Proof of that determination by the Department shall be made at any hearing before it or in any legal proceeding by reproduced copy or computer printout of the Department's record relating thereto in the name of the Department under the certificate of the Director of Revenue. \* \* \* That certified reproduced copy or certified computer print-out shall without further proof, be admitted into evidence before the Department or in any legal proceeding and shall be prima facie proof of the correctness of the amount of tax or penalty due." 35 ILCS 735/3-7(a).

The person must present evidence that is consistent, probable, and identified with the corporation's books and records to support the claim. Id.

In the present case, the Department's *prima facie* case was established when the Department's certified record relating to the penalty liability was admitted into evidence. In response to the Department's record, the respondent first questioned the accuracy of the figure used by the Department for the withholding taxes for the second quarter of 1999. Because the corporation did not file a return for the second quarter of 1999, the Department estimated the taxes by averaging the amounts from prior quarters. The respondent stated that the corporation was not in business during the third month of the second quarter. He said that the corporation was gone from the premises by June 22, 1999. The respondent did not, however, present evidence other than his own testimony that shows that the Department's determination is inaccurate. The respondent did not present any documentation, such as dissolution papers that indicate the date that the corporation dissolved or records of the amounts that were withheld. Without evidence that substantiates his self-serving testimony, it cannot be found that the Department's determination is incorrect.

In addition to questioning the accuracy of the withholding taxes, the respondent contends that he was not the person who was responsible for filing the returns and paying the taxes. The respondent admitted that he was the president of the corporation, which would have allowed him access to the corporation's records. He did not, however, present evidence identified with the corporation's books and records showing that he did not have control over the payment of the taxes. In order to overcome the Department's *prima facie* case, it is incumbent upon the respondent to present evidence other than his own testimony showing that he did not have significant control over the corporation's finances. The respondent could have provided corroborating testimony or documents such as a signature card from the bank showing the respondent did not have authority to pay bills during the liability period. Although the respondent may not have been in

control of the corporation's finances during the liability period, it was necessary to submit documents supporting this conclusion.

The reason the respondent has the burden of overcoming the Department's *prima facie* case is that the respondent has readier access to the records and information regarding why the taxes were not paid. (See Branson at 262.) In addition, this requirement encourages accurate self-reporting. The only evidence presented by the respondent was his self-serving testimony. No corroborating or documentary evidence was presented indicating that he was not in control of the finances during the liability period. The evidence presented by the respondent is insufficient to overcome the Department's *prima facie* case. Without other evidence, it must be found that the respondent was responsible for paying the taxes for time period in question.

#### Recommendation

It is therefore recommended that the Notice of Penalty Liability and Notice of Deficiency be upheld.

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Linda Olivero  
Administrative Law Judge

Enter: August 15, 2001